STATE OF MICHIGAN

COURT OF APPEALS

CITY OF BLOOMFIELD HILLS, Plaintiff-Appellant,	UNPUBLISHED May 11, 2010
v	No. 289800 Oakland Circuit Court
RANDOLPH VINCENT FAWKES, Defendant-Appellee.	LC No. 2007-008662-AR

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from a circuit court order reversing a district court decision denying defendant's motion to suppress the results of a chemical analysis of defendant's blood, which was obtained pursuant to a search warrant. We reverse the circuit court's order.

Bloomfield Hills Police Officer Dustin Lockard arrested defendant for suspicion of operating a motor vehicle while intoxicated and transported him to the police station. Defendant refused to take a breathalyzer test, so Officer Lockard prepared an affidavit for a search warrant to obtain a sample of defendant's blood. The affidavit was prepared using a standardized form in which Officer Lockard added details particular to defendant. The affidavit states that Officer Lockard was "investigating a motor vehicle incident involving intoxicating liquor/controlled substance that occurred at 2:10 A.M. 05/04/2007 . . . ." Officer Lockard averred that defendant was the driver involved in the incident and was observed "sitting in the driver's seat." The affidavit further states:

> (D) That Affiant believes that said described person is under the influence of intoxicating liquor And/or controlled substance based upon the following personal observations:
>
> I. Affiant observed the Subject driving in the following manner: Operating vehicle on roadway, stop on roadway and exit vehicle.
>
> II. Suspect had an odor of intoxicants emanating from his / [sic] breath, person, interior of vehicle, and Suspect had watery eyes.
>
> III. Sobriety test results: Refused to perform tests.

* * *

IV. Suspect's driving record indicates 1 alcohol related driving offenses [sic].

The district court held an evidentiary hearing at which Officer Lockard admitted that he did not examine defendant's eyes. The district court found that the reference to "watery eyes" in the affidavit was "a mistake," but suppression was not required because the remaining allegations in the affidavit were sufficient to establish probable cause to issue the search warrant. Accordingly, the court denied defendant's motion to suppress.

In his appeal to circuit court, defendant noted that in addition to the inaccuracy regarding the "watery eyes," the affidavit used to obtain the search warrant also incorrectly stated that defendant had a prior alcohol-related driving offense. However, plaintiff did not dispute that defendant's driving record actually consisted of a responsible plea to careless driving, a civil infraction. The circuit court concluded that the assertions concerning "watery eyes" and defendant's driving record must be disregarded as false, and the remaining averments in the affidavit were insufficient to establish probable cause to issue the warrant to draw defendant's blood, and the blood test results should therefore be suppressed. The circuit court reversed the district court's decision.

On appeal, plaintiff does not dispute that the circuit court properly disregarded information concerning defendant's watery eyes and prior driving record, but argues that the circuit court erred in concluding that the remaining allegations in the affidavit were insufficient to establish probable cause to obtain a search warrant to draw defendant's blood.

"We review de novo a trial court's ultimate determination on a motion to suppress and its factual findings for clear error." *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008) (citations omitted). Generally, "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts." *People v Keller*, 479 Mich 467, 474, 477; 739 NW2d 505 (2007) (citations and internal quotations omitted). Where an affidavit has been redacted, however, de novo review is appropriate to determine whether the redacted affidavit is sufficient to establish probable cause, because the magistrate did not have the opportunity to assess the facts as set forth in the redacted version. *United States v Elkins*, 300 F3d 638, 651 (CA 6, 2002); *People v Hebert*, 46 P3d 473, 481 (Colo, 2002). Probable cause to search exists "when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched." *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992).

In *Stumpf*, this Court explained:

> *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978), requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause. In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a

> preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. *Id.*, pp 171-172; *People v Williams*, 134 Mich App 639, 643; 351 NW2d 878 (1984), lv den 421 Mich 860 (1985). [*Id.* at 224.]

Here, after disregarding the averments regarding defendant's "watery eyes" and defendant's prior driving record, the remaining averments in the affidavit indicate that defendant "had an odor of intoxicants emanating from his / [sic] breath, person, interior of vehicle," that Officer Lockard observed defendant "[o]perating vehicle on roadway, stop on roadway and exit vehicle," and that defendant refused Officer Lockard's request to perform sobriety tests.

Regarding the significance of defendant's refusal to participate in field sobriety testing, the circuit court stated:

> Finally, Officer Lockard's affidavit indicates that Defendant refused to perform sobriety tests. In considering this allegation, it must be recognized that such conduct "is not evidence of guilt or innocence" in a drunk driving case, nor is it evidence of any essential element of the crime. *People v Stratton*, [148 Mich App 70; 384 NW2d 83 (1985)]; *People v Duke*, [136 Mich App 798; 357 NW2d 775 (1984).] As a result, such evidence is not admissible in a criminal trial on a drunk driving offense, at least not to prove that Defendant was, in fact, intoxicated while operating his vehicle. *Id.* Moreover, where such evidence is admitted for another purpose, the jury must be instructed that the evidence may not be used "in determining the defendant's innocence or guilt." MCL 257.625a(9). If Defendant's refusal to submit to sobriety testing "is not evidence of guilt or innocence," it is difficult to see how the same evidence could be said to establish probable cause to believe that evidence of illegal levels of intoxication would be found in Defendant's blood.

We conclude that the circuit court's reasoning is flawed because (1) the authorities and principles on which the circuit court relied concern a refusal to participate in chemical testing pursuant to MCL 257.625a, and (2) a prohibition on the admissibility of evidence in a prosecutor's case-in-chief does not mean that evidence may not be considered in an evaluation of probable cause.

First, the cases cited by the circuit court, *Duke*, 136 Mich App 798, and its progeny, including *Stratton*, 148 Mich App 70, are based on statutory provisions governing chemical tests pursuant to MCL 257.625a. MCL 257.625a(9) states,

> A person's refusal to submit to a chemical test as provided in [MCL 257.625a(6)] is admissible in a criminal prosecution for a crime described in [MCL 257.625c(1)] only to show that a test was offered to the defendant, but not as evidence in determining the defendant's innocence or guilt. The jury shall be instructed accordingly.

MCL 257.625a(6) states that "[t]he following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than preliminary chemical breath analysis," and lists the pertinent provisions. These statutory provisions do not pertain to field sobriety tests,

and cases applying these provisions have not extended the principles to field sobriety tests. Decisions from other jurisdictions recognize that it is proper to infer a consciousness of guilt from a motorist's refusal to perform field sobriety tests. For example, in *State v Sanchez*, 131 NM 355, 358; 36 P3d 446 (2001), the court stated:

> The State can use evidence of a driver's refusal to consent to the field sobriety testing to create an inference of the driver's consciousness of guilt. [The arresting officer], or an objectively reasonable officer in his position, could logically infer from Defendant's refusal to consent to the field sobriety testing that Defendant knew he was driving under the influence of alcohol and that these tests might reveal his impairment. This inference, combined with the officer's other observations of Defendant, gave [the arresting officer] probable cause to arrest Defendant for DWI. [Internal citations omitted.]

See also *Hoffman v State*, 275 Ga App 356, 358; 620 SE2d 598 (2005); *State v Filchock*, 166 Ohio App 3d 611, 625; 852 NE2d 759 (2006).

Second, even if the statutory provisions that are applicable to a refusal of chemical testing were extended by analogy to field sobriety testing, the prohibition on the consideration of particular evidence on the issue of guilt or innocence does not mean that the evidence cannot be considered in determining whether there is probable cause for a search warrant. For example, an affidavit for a search warrant may include information revealed by a confidential informant, and a search warrant may be issued on the basis of an affidavit that contains hearsay. *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991); *People v Brooks*, 101 Mich App 416, 419; 300 NW2d 582 (1980).

With respect to the significance of Officer Lockard's detection of an odor of alcohol, the circuit court relied on *People v Rizzo*, 243 Mich App 151, 158; 622 NW2d 319 (2000), in which this Court agreed that "the strong odor of intoxicants on a motorist's breath, standing alone, can provide a police officer with a reasonable, articulable, particularized suspicion that the motorist was driving while under the influence of intoxicating liquor." This Court explained that a police officer may then instruct a motorist to perform roadside sobriety tests in order to confirm or dispel the reasonable suspicion that the motorist consumed intoxicating liquor and this affected his ability to operate a motor vehicle. *Id*. at 161. In this case, the circuit court extrapolated from *Rizzo* that, standing alone, a strong odor of intoxicants does *not* establish probable cause to arrest the motorist or to search his body for evidence of illegal levels of intoxication. However, the present case does not involve the odor of intoxicants standing alone.

With respect to the averment concerning the stop and exit on the roadway, the circuit court noted that the affidavit provided no further information and the court did not see how the averment could have led the magistrate to conclude that defendant was intoxicated at that time. However, the fact that defendant stopped his vehicle in the roadway and then exited the vehicle was properly considered as part of the totality of the circumstances set forth in the affidavit.

We conclude that the averments that defendant stopped and exited his vehicle on the roadway at approximately 2:00 a.m., that he had "an odor of intoxicants coming from his breath, person, interior of car," and that he refused to perform sobriety tests, considered together, are adequate to establish probable cause to issue a search warrant for defendant's blood.

Accordingly, the district court did not err in denying defendant's motion to suppress, and the circuit court erred in reversing that decision.

Reversed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder